BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D. C. 20001-8002

DATE: November 18, 1996

CASE NO: 94-INA-552

In the Matter of:

CALVIN MAINTENANCE,
Employer,

On Behalf of:

HENRYK ADAM KUBERA,
Alien

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Henryk Adam Kubera ("Alien") filed by Employer Calvin Maintenance ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York City, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 5, 1992, as amended, Employer filed an application for labor certification to enable the Alien to fill the position of "Foreman" in the business activity of "Demolition Maintenance" at an hourly salary of $16.57. As amended, one year of experience in the job offered or in the related occupation of "foreman/factory"[1] was required; the educational requirement was 8 years of grade school. The job offered was described as:

* Evaluate job requirements
* Determine what men, and how many men are necessary for the job
* organize and delegate work at job-site
* supervise workers/arrange transportation
* ensure quality control at job-site
* maintain payroll records for all workers at job-site
* calculate hours/payroll
* act as liaison between management and workers

(AF 5, 27). Listed under "Other Special Requirements" were that the applicant be able to speak Polish "in order to communicate with workers in his employ," that he be able to work independently without supervision, that he have a telephone and driver's license, and that he be able to "report on short notice, i.e., within 12 hours." (AF 5, 27). In an Addendum to the original application, the Employer indicated that the applicant would supervise five to ten laborers who would be cleaning, sweeping, and engaging in light demolition of the interiors of buildings in preparation for the building's renovation, after the heavy demolition (e.g., knocking out walls and doorways) had already been completed. (AF 41).[2]

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[1] Part A of the application form shows "supervisor/demolition" crossed out and replaced by "foreman/factory." (AF 5; compare AF 27).

[2] The state agency classified the job as "Supervisor, Janitorial Services" (AF 5), a classification that appears to be inappropriate.

Part B of the application originally showed the Alien as having only four months of experience aside from his experience with the Employer; that experience was as a carpenter's helper for an unknown firm. (AF 24). As amended, the application showed the Alien's dates of employment with that firm as being two years earlier and included 1 1/2 years experience as a Lead Hand/Foreman with an unnamed Steel Factory in Australia. (AF 2, 63-64).

A transmittal with accompanying worksheet from the state agency indicated that there were 14 applicants, all of whom were rejected. The state agency indicated that an attempt was made to contact ten applicants, and that five applicants disputed the Employer's account and maintained that they were qualified. (AF 140-144).

On February 24, 1994, the CO issued a Notice of Findings in which she notified the Employer of the Department of Labor's intention to deny the application because of certain deficiencies including the use of a restrictive requirement [the alternative requirement of one year experience in the related occupation of "Foreman/Factory"] tailored to the Alien's qualifications (citing 20 C.F.R. 656.21(b)(2)) and the rejection of nine applicants [Henryk Kosiak, Wojtek J. Miszczak, Frank Danowski, Wlodzimierz Jezek, Ireneusz Siedlecki, Andrew Kolomanski, Maciej Pietraszek, Zbigniew Zolnieruk, and Jerzy Siemionczyk] who appeared to be qualified (citing 20 C.F.R. §§ 656.20(c)(8), 656.21(b)(6), and 656.24(b)(2)(ii)). The Employer was asked to amend the related occupation to read "any supervisory position." (AF 145-150).

The Employer submitted its rebuttal on March 18, 1994, consisting of a statement by the Employer's President indicating a willingness to readvertise. On the issue of the recruitment efforts, the Employer noted that the applicants might have been more qualified had it been permitted to advertise with the alternative experience of "foreman/demolition," as it had originally wanted to do. (AF 159).

On April 4, 1994, the CO issued a Final Determination in which she found the Employer's rebuttal acceptable on the restrictive requirement issue in view of the Employer's agreement to amend and readvertise, but she found the rebuttal inadequate with respect to the basis for rejecting the nine applicants; she therefore denied the application. (AF 160-161).

The Employer requested review of that denial on May 5, 1994. (AF 171).

DISCUSSION

In view of the Employer's agreement to readvertise without the requirement that the CO found to be unduly restrictive, the only remaining issue is whether the Employer has engaged in a good faith effort to recruit U.S. workers.

Section 656.21(b)(6)[3] provides that if U.S. applicants have applied for the job opening, the employer must document that such applicants were rejected solely for job-related reasons; section 656.20(c)(8) provides that the application must show the job opportunity has been and is open to any qualified U.S. worker; and section 656.21(j) requires the employer to provide the local office with a written report of the results of the employer's post-application recruitment efforts. Under section 656.24(b)(1), the CO's determination whether to grant labor certification is made on the basis of whether the employer has met the requirements of Part 656, but labor certification may be granted despite harmless error, provided that the job market has been tested sufficiently to warrant a finding of unavailability. Under section 656.24(b)(2)(ii), the CO's determination is made based upon whether there is a U.S. worker who is able, willing, qualified, and available for the job opportunity; such worker will be considered able and qualified if "by education, training, experience, or a combination thereof, [the worker] is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed."

In general, an applicant is considered qualified for the job if he or she meets the minimum requirements specified by an employer's application for labor certification. ***The Worcester Co, Inc.,*** 93-INA-270 (Dec. 2, 1994); ***First Michigan Bank Corp.,*** 92-INA-256 (July 28, 1994). However, an employer may reject an applicant who meets the stated requirements but is nevertheless demonstrably incompetent to perform the main duties of the job, based upon information obtained from references or objective testing during the interview. ***First Michigan Bank Corp., supra.*** Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if it does not state that he or she meets all the job requirements, an employer should further investigate the applicant's credentials by an interview or otherwise. ***See Dearborn Public Schools,*** 91-INA-222 (Dec. 7, 1993) (***en banc***); ***Gorchev & Gorchev Graphic Design,*** 89-INA-118 (Nov. 29, 1990) (***en banc***).

In the instant case, the CO found that the Employer had not stated an adequate basis for rejecting nine applicants. Some of these applicants lacked experience listed on the labor certification application and in the advertisement, but the CO challenged the experience requirement they failed to meet as unduly restrictive. In fact, the Employer asserts that the challenged related occupation of "foreman/factory" was suggested by the state agency instead of "supervisor/demolition" (including three months of experience in demolition and one year as a supervisor). (Compare AF 5 with AF 27, 38-41). We agree that factory foreman appears to be an unusual selection for related occupation and that demolition supervisor or even construction foreman would be more appropriate alternatives. The amendment was apparently suggested because the Alien's experience was obtained with the Employer, but the Employer argued that

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[3] All section references are to title 20 of the Code of Federal Regulations.

the supervisory experience was obtained in a factory and the three months demolition experience was another job; the Employer also sought to show that it would be infeasible to now train a U.S. worker to perform the job because senior management was occupied with other duties such as finding and bringing in new business and contracting to do new demolition projects. (AF 38-39, 59-61). The Employer argues that as the applicants were not qualified based upon an amendment suggested by the Labor Department, it should not be penalized for making this amendment. (AF 171).

It is well established that the CO is not bound by any statements or actions by the local employment service in his or her review of the application. ***E.g., Aeronautical Marketing Corp.,*** 88-INA-143 (Aug. 4, 1988). ***See also Peking Gourmet,*** 88-INA-323 (May 11, 1989) (***en banc***); ***Inner City Drywall Corp.,*** 90-INA-192 (June 24, 1991); ***Bob's Exxon,*** 89-INA-259 (May 2, 1991). However, when evaluating an application in which misleading information was provided by a local employment service, a CO has the discretion to permit the employer to correct that defect. ***Sverdrup Technology, Inc.,*** 88-INA-310 (Mar. 27, 1990).

Here, we agree with the CO that the alternative experience requirement does not appear to be sufficiently related to the job. The problem is that it is still uncertain what exactly the job requirements are or should be. At least one applicant (Kosiak) meets the alternate experience requirement as factory foreman (in his position as Shift Foreman for a State-owned Housing Construction Corporation that assembled pre-fabricated concrete modular elements.) (AF 110-114, 138-139). We also note that at least two of the applicants (Siedlecki and Danowski) appear to be qualified based upon the requirements set forth in the original application (AF 99-100, 103-104, 129-130, 133-134). Moreover, applicants Miszczak (AF 105,109, 135-137), Jezek (AF 101-102, 131-132) Zolnieruk (AF 108) and Siemionczyk (AF 119-120) would qualify if the job were readvertised to include any type of supervisory experience. Under these circumstances, it appears that there are qualified U.S. workers.

In view of the above, the Employer has failed to show that there were no qualified, available U.S. workers to fill the job opportunity. Accordingly, the application for labor certification must be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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PAMELA LAKES WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: CALVIN MAINTENANCE
(Alien: Henryk Adam Kubera)

Case No. : 94-INA-552

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Huddleston			

Thank you,

Judge Wood

Date: